No. 84-1717 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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In this case, the Ninth Circuit has held that under the Fourth Amendment a defendant has a reasonable and legitimate expectation of privacy in a boat simply on the basis that he is the owner of record of the vessel and is a coventurer in a criminal enterprise involving the use of the ship by others to smuggle drugs in which he has a possessory interest. Respondent was accordingly permitted to challenge the lawfulness of the search of the boat, and thus to seek the suppression of evidence seized during the search, even though it is undisputed that he never personally used the boat or maintained private living quarters or storage space on it, that he purchased the boat for the purpose of having other people use it in connection with a drug smuggling venture, that he was not present on the boat during its voyage or at the time it was searched, and that the boat was out of his custody and control during both the two-month period preceding the search and the two years following the search.

As we demonstrated in the petition, the holding of the Ninth Circuit is fundamentally in error and irreconcilable with the decisions of this Court and of the other courts of appeals. Whether viewed individually or together, the considerations relied on by the court below—a defendant's title to the boat, his stake in the smuggling venture, his possessory interest in the contraband that was seized, and efforts by those on board the boat to conceal the drugs—do not establish that *the defendant* had a Fourth Amendment expectation of privacy in the area searched or that the government's action implicated *his* personal right to be free from unreasonable searches and seizures. We add the following comments in reply to respondent's brief in opposition.

1. Respondent contends (Br. in Opp. 13-17) that the court of appeals' decision does not state a legal rule but instead is a factual determination based on a totality of factors that are unique to this case and unlikely to arise in the future. This characterization is incorrect. The court's holding does not involve a discretionary weighing of variables that turns on the specific facts presented and is not amenable to a legal standard. Rather, it sets forth a general principle of law that is applicable in all like cases.

Nor is it correct that the circumstances of this case are unique and unlikely to be repeated. Quite the contrary: as indicated by the cases we have cited (Pet. 9-19), the issue of the Fourth Amendment rights of an absentee owner and co-venturer is a recurring one. Moreover, as in this case, the beneficiary of the ruling below will frequently be the leader or "kingpin" of smuggling operations, who typically purchases a conveyance for others to use to transport contraband in which he has a possessory interest. Accordingly, the question presented is of substantial importance to the administration of criminal justice.

2. The cases from other circuits upon which respondent relies (Br. in Opp. 27-30) do not support the court of appeals' decision here. In *United States* v. *Shaefer*, 637 F.2d 200, 203 (3d Cir. 1980), a corporation and its president were found to have "standing" to challenge the stop and search of trucks owned by the president and used by the company. In *United States* v. *Haydel*, 649 F.2d 1152, 1154-1156, modified, 664 F.2d 84 (5th Cir. 1981), cert. denied, 455 U.S. 1022 (1982), the court held that the defendant could contest a search of his parents' house because he had been given permission to use the house and had unencumbered access to it, he had stayed in the house overnight at various times and kept clothes and gambling records there, and he was often on the premises and conducted a significant portion of his gambling activities at the house. Neither of these decisions addresses the issue in this case: the Fourth Amendment rights of one who holds bare title to the searched property but has never made use of it and had relinquished all custody and control to others for a substantial period of time when the search occurred. Nothing in those cases gives rise to a privacy interest on the part of respondent in the circumstances presented here.

3. Respondent also argues (Br. in Opp. 10-12) that this case is interlocutory and hence unsuited for review because the court of appeals remanded to the district court to consider the merits of his motion to suppress, as to which the government may still prevail. But this argument ignores the fact that the court of appeals' decision has the effect of vacating respondent's conditional guilty plea to the charges against him (see Pet. 2, 21 n.10), which plea is not subject to reinstatement in the event the suppression motion is denied on the merits. As in any case in which a plea of guilty is set aside on appeal, the ruling here is final rather than interlocutory with respect to the disposition of the case on the basis of the plea. An appellate decision upsetting a final and

conclusive judgment of conviction entered by the district court can hardly be considered interlocutory merely because it has the consequence of requiring further proceedings in lieu of those that resulted in the existing determination of guilt. If we are correct that the Ninth Circuit's decision is erroneous, the government is entitled to the benefit of its bargain that resolves the charges once and for all. Furthermore, our opportunity to seek review of the holding in this case may be lost entirely if, for example, the government prevails on the merits of the suppression motion and respondent is subsequently acquitted. See *California* v. *Stewart* (joined with *Miranda* v. *Arizona*), 384 U.S. 436, 498 n. 71 (1966). Accordingly, the posture of the case provides no ground for denying our petition and deferring review of the "standing" issue pending remand.*

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*The posture of this case is thus quite different from what it would be had respondent already been convicted at trial following denial of his suppression motion. If the court of appeals remanded such a case for further proceedings respecting the suppression motion, the matter would be truly interlocutory: either the motion would be denied, the conviction would stand, and the "standing" issue would be moot, or the motion would be granted and the government could appeal. In neither circumstance would the government be exposed in a case like that to the risk of losing its conviction and having a retrial that could lead to a potentially unreviewable acquittal.

The petition also noted (at 21 n.10) that we had been advised by the United States Attorney that the government's principal witness was no longer available to testify at trial and that the prosecution therefore could not proceed even if the government prevailed on the merits of the suppression motion. This assessment was based on the fact that the witness had left the country and had not been in contact with the prosecutor for two years. The United States Attorney now informs us, however, that, as respondent points out (Br. in Opp. 11 n.4), it is a condition of the witness's plea agreement and probation that he return to testify in this case if necessary. At this juncture, the United States Attorney simply does not know whether the witness will in fact be available to testify. Whatever the ultimate resolution of this matter, however, it in no way detracts from our submission that the legal issue raised here warrants certiorari and that review at the present time is appropriate.

For the foregoing reasons and those stated in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted. As suggested in the petition, the Court may wish to consider summary reversal.

CHARLES FRIED
Acting Solicitor General

SEPTEMBER 1985